2006

State of Utah v. Donald Millard : Opening Brief of Appellant

Utah Supreme Court

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, vs. DONALD MILLARD, Appellant.	)))))))))	**CASE NO. 20060336 CA**

OPENING BRIEF OF APPELLANT

APPEAL FROM THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
JUDGE RANDALL SKANCHY

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IN THE UTAH COURT OF APPEALS

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INITIAL BRIEF OF APPELLANT

JURISDICTION

This Court has jurisdiction pursuant to § 78A-3-102(4).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Whether defense counsel's unfulfilled promise to the jury to provide Don's and his mother's testimonies constitutes ineffective assistance of counsel.

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness." ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

Citation to Record: Raised for the first time on appeal.

2. Whether defense counsel's admission to the trial court of the existence of a conspiracy involving defendant and that the object of the conspiracy was to harm defendant's exwife constitutes ineffective assistance of counsel.

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness." ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

Citation to Record: Raised for the first time on appeal.

3. Whether defense counsel's failure to advise appellant he had a constitutional right

to testify and refusal to allow him to testify after telling the jury he would constitutes ineffective assistance of counsel.

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness." ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

Citation to Record: Raised for the first time on appeal.

4. Whether defense counsel's failure to object to the prosecutor's wrongful arguments and allegations of fact concerning the telephone records in trial exhibits 19, 20, and 21 when those exhibits were never admitted into evidence constitutes ineffective assistance of counsel and whether such wrongful arguments constitute prosecutorial misconduct.

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness. ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131. The initial determination of whether improper remarks have influenced a verdict is within the discretion of the trial court. ***State v. Todd***, 2007 UT App 349, ¶ 14.

Citation to Record: Raised for the first time on appeal.

5. Whether appellant's defense counsel was ineffective by failing to object to the hearsay testimony of Ted Anthony and failing to file a motion in limine to exclude the statements.

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness." ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

Citation to Record: Raised for the first time on appeal.

6. Whether defense counsel was effective by failing to prepare and investigate facts and witnesses identified by Don and to call and/or subpoena defense witnesses.

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness." ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

Citation to Record: Raised for the first time on appeal.

7. Whether the remand findings were unsupported by the record.

Standard of Review: A trial court's factual findings may not be disturbed unless it clearly erroneous. ***Sigg v. Sigg***, 905 P.2d 908 (Utah App.1995)

Citation to Record: Findings of Fact and Conclusions of Law. (R.1022-1006)

8. Whether Defense Counsel Were Ineffective by Failing to Preserve the Record

Standard of Review: Ineffective assistance of counsel claims raised for the first time on appeal are reviewed for correctness." ***State v. Diaz***, 2002 UT App 288, ¶ 13, 55 P.3d 1131.

Citation to Record: Raised for the first time on appeal.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 77-1-6; Utah State Constitution, Art.I, §. 7, Utah State Constitutional, Article I § 12, 6th Amendment to the U.S. Constitutional, and 14th Amendment to the U.S. Constitutional, Due Process Clause, Rule 103, U.R.E. and Rule 801(c), U.R.E.

STATEMENT OF THE CASE

Appellant (hereinafter "Don") was initially charged by information with two felonies. R.8-11. The information was amended charging Don with two counts of conspiracy to commit aggravated murder, both first degree felonies. R.54-55. Don was sentenced on March 13, 2006. R.449-450. Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Arrest Judgment Commitment was filed. R.451-456. Don's Notice of Appeal was timely filed on April 12, 2006. R.457-458. An application for certificate of probable cause filed in the trial court on August 17, 2007. R.513-523. Affidavits of Glenda Millard ("Glenda ") R.546-551, Duane Millard ("Duane") R.535-545, and Don R.552-566, filed in support of application for certificate of probable cause. Denial of application via minute entry December 20, 2007. R.822. Court of Appeals granted Rule 23B motion May 30, 2008. Evidentiary hearing held on October 2, 2008. R.962-963. Motion to supplement remand hearing record - October 22, 2008 R.969-971, memorandum in support of motion to supplement remand hearing record and proposed

order filed same date R.972-980;R.981-987. Findings of fact read in court on December 5, 2008. R.996-1004. Rule 23B findings of fact and conclusions of law signed by Judge Kouris February 20, 2008 and entered March 6, 2009 [The 6th Supplemental Index of Record on Appeal indicates otherwise, February17, 2009 - a discrepancy between two trial court indexes, the copy of such provided in the addenda.] Motion for remand to supplement the record June 3, 2009 R.1111-1133 and order from Court of Appeals June 8, 2009 R.1134.

STATEMENT OF FACTS

1. During her opening statement to the jury, defense counsel promised the jury Don would testify, and he would testify that Davey Desvari ("Davey") was a good friend. R.502:250. Defense counsel explained that after the State's case, defendant would get a chance to put on controverting evidence, then, at the end, defense counsel would be able to fit it all together. R.502:253. She also promised that over time, **you'll hear testimony that the family felt – meaning Don and his parents** [Emphasis added.] R.502:255. Contrary to her promises to the jury, Don and her mother never testified. Moreover, during closing argument, defense counsel broke the promise of being able to fit it all together – "And I can't tell you how it all fits together". R.504:835.

2. Detective Chamberlain met with Don on September 11, 2004 at approximately 11:30 p.m. The interview began at about 11:30 p.m. and crossed over midnight. R.502:274-275;503:493. Prior to that, a call from Susan Hyatt ("Susan") (Don's exwife) to Don was made at about 10:00 p.m. on September 11. R.502:273.

3. Don was charged with two counts of conspiracy to commit aggravated murder wherein he was alleged to have conspired with Ben Desvari ("Ben") and James Brinkerhoff ("Brinkerhoff") to kill his exwife, Susan Hyatt ("Susan"). R.502:221-22; R.502:282,373.

4. At trial, defense counsel never approached Brinkerhoff to go over Don's or Davey's (Ben had his brother's phone) phone records with him. R.1031:162.

5. Ben testified that on September 11, 2004, after he spoke to Brinkerhoff (who had just returned from Susan's home), he called Don a dozen times. R.502:319. Later he testified he never spoke to Don again that evening. R.502:320. Defense counsel never cross-examined him on this discrepancy. Don stated Ben never called him a dozen times. R.1081.

6. Ben said he gave Don a phone number to reach Brinkerhoff. **When asked what that number was, Ben didn't "remember the exact phone number. I know he told me he was in either a bar or somewhere in Magna.**" R.502:319. Later, Ben testified that I think he said, ***the exact thing is, he was in a bar in Magna***". R.502:320. (This was contradicted by Brinkerhoff's testimony where he stated he called Ben from his sister's house. R.502:385. "I stopped [at a bar], washed my hands. Then I went to my sister's house in Magna [from where he called Ben]." R.502:395. However, Brinkerhoff could not remember his sister's phone number. R.502:386. The record is clear that at no time did the State or defense counsel approach Ben and show him the phone records, asking him to identify any of the phone numbers from the Sprint records (Don's cell records) or Kricket (Ben's brother's cell records). Ditto for Brinkerhoff. Even the State, in its closing argument admitted these witnesses were not shown any phone records: "I'll just briefly remind you, we didn't even talk about all these phone calls." R.504:845; R.1031:162.

7. Brinkerhoff testified that after he left Susan's house he went to his sister's house in Magna and called Ben's cell phone. He testified that Ben asked for his number and then called him back at his sister's number. Then Don called him. R.502:385. Even though the actual phone records contradict this, defense counsel never cross-examined Brinkerhoff or Ben on this discrepancy. *See* Exhibits 19, 20, and 21.

8. Ben said the number Brinkerhoff gave him for Don to call was, "I think he said, the exact think is, he was in a bar in Magna". R.502:320.

9. At the remand hearing, defense counsel testified they had the phone records for at least 10 months prior to trial. R.1031:31.

10. Defense counsel considered calling Melody Oliver to impeach the testimony of Ted Anthony ("Ted"). R.1031:86-87. Melody was important, because Melody was Ted's girlfriend at one time. Defense counsel wanted to use her to say things about Ted being an unreliable person and who would falsely accuse someone at the drop of a hat to save himself. So Melody potentially could be helpful to testify against Ted Anthony, that he was willing to lie about other people to save his own skin. Defense counsel felt there was a reason to pursue Melody, and they absolutely pursued her. R.1031:130. R.1055-56. However, she was never called as a witness. [Defense counsel said she was not willing to testify. That is contradicted by the fact that she willingly provided an affidavit for Don for the Rule 23B remand.]

11. During the cross-examination of Ben, including re-cross-examination, he was never asked by defense counsel about the meeting in the Murray park between Don, Don's father, Glenda , and Diane, and him where Ben told these persons that Don didn't have anything to do with any attempt to kill his exwife, that he was innocent of any wrongdoing. Moreover, defense counsel never asked Ben about his similar conversations with Diane Martin where Ben met with her in her home along with Don when Ben told them that Don didn't have anything to do with attempting to kill Susan, that he was innocent. R.1064-63. R.502:330-366,370-373. [Glenda R.1110-1108; Don R.1082,1079-78; and Diane Martin ("Diane") R.1063-1064]

12. Brinkerhoff testified that when he got to Susan's house, he had a change of heart and didn't want to kill her. R.502:381. His reason in still continuing to Susan's house was to see Don because he knew that Don was going to be bringing the children back from a vacation to her home and he had permits with him Don wanted obtained. R.502:382.

13. Brinkerhoff testified he went to Susan's house and asked to borrow her cell phone

to call Don. She let him in her house and allowed him to use it to call Don. Brinkerhoff stated he spoke to Don about papers (permits) for the job [Don was starting after returning from his vacation]. R.502:382-83;503:588.

14. Brinkerhoff testified that as he handed Susan's cell phone back, he was standing on the landing half-way to the door. As he turned to leave, his knife slipped out of his waistband and fell to the floor. Susan turned and lunged for the knife. They wrestled with the knife and then Brinkerhoff gave it to Susan. She received some minor injuries on her hand. Brinkerhoff asked her if she needed any help. He went to the sink and got some paper towels and again asked if she needed any help. She told him to leave and he asked for his knife. He then followed her out the door [she being in front of him] and left. R.502:383-84. This markedly differed from Susan's testimony concerning Brinkerhoff's attack. *See* R.503:595-97. However, this testimony was entirely consistent with the actual injuries Susan suffered. *See*Addendum Pictures of Susan's injuries.

15. Brinkerhoff said he went to his sister's house in Magna and called Ben. Ben said he would call back. He said that Ben called back and then Don called him. R.502:385.

16. Brinkerhoff said that Don told him he wanted to meet him to find out what happened. R.502:386. ***Then, Brinkerhoff was asked if he could remember his sister's phone number. He said, "I do not."*** He did not remember the phone number of Ben. R.502:386. Never once did the prosecutor and defense counsel approach him, show him the phone records, and ask him any questions about the Sprint and Kricket phone records. Ditto for the prosecutor and defense counsel approaching Ben, showing him the phone records, and asking him any questions about the Sprint and Kricket phone records. R.1031:162.

17. Brinkerhoff testified that when Don called him, "He wanted to meet with me to find out what happened". R.502:386. Brinkerhoff said that Don would come out to

Brinkerhoff's sister's house. Brinkerhoff said Don told him where he was and how long it would take him to get where he was. Brinkerhoff then said he met Don by my sister's house, on his way home or whatever. Brinkerhoff testified that when Don met him, he didn't say anything other than "Well, we'll go from here" and that was about it because he continuously got interrupted by his cell phone. There was no foundation objection by defense counsel at any time during this phase of Brinkerhoff's testimony. R.502:386. ***During cross-examination, defense counsel never asked Brinkerhoff where Don told him he was, never asked him how long Don told him it would take him to get there, never asked him what time Don initially called him, never asked what time Don met Brinkerhoff in Magna, never asked if it were near Brinkerhoff's sister's house, and never asked who was present.*** R.502:393-423,424-426. (Defense counsel missed a golden opportunity to provide an alibi for Don by not asking these questions during cross-examination. This is critical because Don was coming back from a vacation and did not arrive in Salt Lake City until after 8:00 p.m. on September 11, 2004. R.1105-03.

18. The State then asked Brinkerhoff if he were housed next to Don in the Tooele County Jail to which he answered yes. Brinkerhoff stated that while housed next to him in the jail, Don supposedly asked him if he knew anyone who could take care of Ben. There was no objection by defense counsel. R.502:387-88. Brinkerhoff testified that Don was housed next to him in the Tooele County Jail for 12 or 13 days, housed in the same unit, and that they had conversations with each other. R.502:387,424. At no time during defense's cross-examination of Brinkerhoff was he asked about a conversation he had with Don at the jail to the effect that Don was not to believe what Brinkerhoff told the police because Brinkerhoff was being offered immunity and Brinkerhoff said that Don had nothing to do with the Susan/knife incident, and that he would state such at trial. R.502:393-423,242-426; Don affidavit, R.1079.

19. Brinkerhoff testified that Ben told him Don would be returning his children to

Susan on 9/11/04. Brinkerhoff also testified that he went out to Susan's house only to meet Don so he could get a construction job offer from him. He then contradicted himself by saying he went to Susan's for the purpose of killing her but changed his mind. He testified he went to Susan's house to wait for Don. Defense counsel never asked Brinkerhoff which time he was telling the truth – at the preliminary hearing or here at trial. Moreover, defense counsel never asked Brinkerhoff questions concerning when Don met him in Magna (¶19, above). R.502:421-22. At the preliminary hearing, he testified that Don was unaware Brinkerhoff went to Susan's home intending to meet Don there when Don returned the children to her after his vacation. R.490:10,15.

Ted Anthony

20. Ted Anthony ("Ted") was a state's witness who allegedly had information concerning Don attempts to find someone to kill Susan. R.503:434-489.

21. Ted first met Don who was an apartment manager of a complex where Ted's friend, Melody Oliver ("Melody"), lived. Ted admitted he was dating Melody and had a past relationship with her. Ted referred to her as his girlfriend. R.503:434. Ted testified to hearsay statements allegedly made by Melody without any objection from defense counsel.

22. Ted testified that when he first went to Melody's apartment, he met a person in her apartment named Idrese. Ted then testified to statements allegedly made by Idrese without any hearsay objection by defense counsel. Ted testified he first met Don during the third week of August, 2004. R.503:435.

23. Defense counsel allowed more hearsay to come in from Ted without making an objection. R.503:438-439. ***The following exchange from the trial took place without any objection whatsoever from defense counsel***:

> A And he [Idrese] said, "Well, we need somebody like that."
> Q Did you find out what he meant by "we"?

A He'd [Idrese] said, "Don and -- well, he said, "We need somebody like that. And I was confused who "we" was. And he said, "Well, Don and I need somebody like that, someone professional."

24. Also at this time, defense counsel allowed Ted to testify about what unidentified persons said about a hit man from the east coast, all without any objection whatsoever from defense counsel. R.503:439.

25. Defense counsel allowed more hearsay from Ted, again, with no objection whatsoever (R.503:440-41):

Q When you met Don Millard, did the subject of this individual come up between you and he?
A Not directly between me and him -- between he and I at first. Idrese brought it up. Idrese addressed Don and said, Well, we've got to get in touch with this guy. He knows someone that we need to get in touch with that we could use, that could help us out.
. . . .
Q Now, Idrese said -- Idrese just told you that, This is somebody that we could use. Did it ever come to your knowledge as to why Don Millard could use a person like this?
A The night before Idrese had told me that they needed his wife taken care of. "We need her taken care of. We need to get rid of her."

I can't tell you for sure that I remember him exactly saying, "We need her being killed," but I do know that it was very understood: We need her taken care of; we need her gotten rid of.

26. Later, without objection from defense counsel, Ted testified that Don told him he wanted his exwife killed because she was draining his bank accounts. R.503:441.

27. Ted admitted he had strong suspicions that Melody and Don were having a romantic involvement and he confronted Don. He said it took Don a while for him to convince me these suspicions were not true. R.503:442. This is in direct contrast to what he testified to at the preliminary hearing. At the preliminary hearing, Ted testified that Don confirmed his suspicions. R.491:24. However, defense counsel never confronted him with this inconsistent

testimony.[1] R.503:451-476.

28. Again, without any hearsay objection whatsoever, Ted testified to more alleged statements made to him by Idrese (at R.503:442):

> Q And was the subject of having his ex-wife killed commonly talked about between the three of you?
> A Yeah. That was the first thing that would always be mentioned or always be brought up, either between himself or Idrese, was whether or not I was able to get a hold of someone to put him in contact with this guy.

29. Without defense counsel making objection regarding foundation or hearsay, Ted testified that Don told him that someone had already made a failed attempt to kill his exwife. Ted also said that Don was relentless in attempting to acquire the name of a hit man from Ted. Additionally, Ted again, without any hearsay objection from defense counsel, testified as to what Idrese said about whether Ted had any luck in contacting the hit man. Ted said he was surprised that Don told him about the attempt on Susan's life and the failed attempt because he really looked like a good guy. R.503:444-45.

30. Ted then testified that he told Don and Idrese he got a different hit man. Their response was they changed their minds, that they didn't need this person any more, even though Ted kept pressing the issue. R.503:447-48. Defense counsel never questioned Ted about how farcical his testimony was, that only Idrese called him for days about a hit man and then when he found one, Don and Idrese no longer needed one. R.503:451-476.

31. Never once during his testimony did Ted establish the exact role of Idrese in this

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[1] This is critical. If Ted were jealous of Don and his supposed sexual involvement with Melody, it would demonstrate a motive for him lying under oath. *See Affidavit of Melody Oliver* R.1056-55.

matter, whether Idrese was working for Don or was acting on his own. R.503:434-489. In fact, during cross-examination, he testified that he did not know why Idrese was at the apartments. R.503:463. Ted also testified that the first night when he met Idrese, Idrese stated something like we could use a someone [a hit man] like that and that when Idrese said this, Don wasn't there. Ted also testified that most of his contact was with Idrese, not Don. Again, all of this hearsay testimony was made without any objection whatsoever from defense counsel. R.503:469.

32. Then, defense counsel, during cross-examination of Ted, perpetuated the hearsay evidence by asking Ted questions about what Idrese said to him R.503:464, all the while knowing that Idrese would not testify and probably knowing that they would not allow Don to testify. *See* (R.1073) and defense counsel's letter to Don. R.1065-66.

33. During cross-examination, a side bar conference was held that was not on the record. R.503:473. In fact, throughout the trial, side bar conferences were held without defense counsel insisting they be on the record. R.503:483, R.502:265.

34. At the preliminary hearing on February 22, 2005 and March 15, 20005 (R.490 & 491), Ted testified. His testimony during these two days of preliminary hearing testimony provided defense counsel ample notice that at trial, his testimony would be filed with objectionable hearsay statements concerning Idrese Richardson and others. Ted's preliminary hearing testimony occurred almost 10 months prior to trial. However, at trial, Ted's testimony regarding Idrese's hearsay statements went basically unchallenged. Defense counsel never objected at any time to this critical hearsay testimony. R.503:434-483.

35. Don's phone records and those of Davey whose brother Ben had access to his cell phone, were offered but never admitted into evidence. The following is a quote from the 4th day of trial concerning these phone records (R.503:600-01):

MR. SEARLE: Judge, pursuant to stipulation by counsel, we move for the admission of all the phone records. These phone records come from Sprint and Cricket.
(Mr. Searle works with the clerk to get some packets of documents marked as Exhibits.)
Judge, State's 19 are Sprint phone records.
State's 20 are Sprint phone records.
State's 21 are phone records from Cricket Corporation, a phone company.
With the Court's indulgence.
(A discussion between Mr. Searle and Mr. Cundick.)
MR. CUNDICK: Your Honor, we may be ready to close. We'd like a one-minute recess to see if there is anything else we want to present in our case in chief.
THE COURT: Okay.
MR. SEARLE: Thank you, Judge.
THE COURT: You can stretch. This is a good time to stretch.
There are some Exhibits over there. I wonder if you would pick them up.
(Off the record.)
MR. CUNDICK: Your Honor, we may be ready to close. We'd like a one-minute recess to see if there is anything else we want to present in our case in chief.
THE COURT: Okay.

36. When the prosecutor spoke of a stipulation concerning these phone records, defense counsel never said anything confirming or denying and never attempted to distinguish to what they were stipulating. Defense counsel never stated whether the stipulation was to authentication or admissibility or both; consequently, it was never made clear to the trial court. R.503:600-01. Defense counsel argued during close that the State had even promised to produce a custodian of the records from the phone company. R.504:834.

37. Even though these phone records were never entered into evidence and the nature of the stipulation was unclear, in their closing argument the state constantly referenced these phone records to corroborate the fact of the conspiracy **without any objection from defense**

counsel. R.504:759.

38. Prior to trial, defense counsel submitted their designation of witnesses who were to be called at trial. These witnesses included Melody, Idrese Richardson ("Idrese), William Penrod, David Desvari, Glenda , and Don. R.191-93. Even though named, none of these witnesses were called to testify on behalf of Don. R.504:609-10. Even though available and wanting to testify, Idrese was never called by defense counsel – they never even bothered meeting with him or investigating his testimony. R.1073-72.

39. On the fourth day of trial, defense counsel, prior to the state resting, informed the trial court that it had a motion to dismiss. The trial court requested that prior to the state resting it wanted to hear defendant's motion to dismiss. Rather than decline for strategic reasons and give the state an opportunity to correct any shortfalls in its case-in-chief, defense counsel bent to the pressure and agreed to make their motion, not a motion to dismiss the whole case but only a motion to dismiss the second conspiracy charge. R.504:612.

40. Then during the motion to dismiss the second conspiracy charge, defense counsel, while in chambers and away from defendant [even though the record indicates defendant was present, defendant, in his affidavit, states that he was not in chambers but was sitting in the courtroom], and without his prior knowledge or authorization to do so, stated, "***I think there was a conspiracy. The goal of the conspiracy was to harm Ms. Hyatt. And Mr. Desvari was enlisted for that purpose in the beginning and was unsuccessful. He continued to work with Mr. Millard and work with Mr. Brinkerhoff and Mr. Desvari continued to have a role.***" R.504:614. [Emphasis added.]

41. During this in-chambers conference, defense counsel stated they intended to call Duane and Glenda Millard. R.504:619-20. However, only Duane was called. R.504:682.

42. Immediately after defense counsel made the motion to dismiss and trial resumed, the state ***recalled*** three witnesses: Brinkerhoff, Ted, and Ben, to make up for the shortfalls listed by defense counsel in its case-in-chief. R.504:609,623,625,626. Defense counsel's informing the state and the trial court prior to the close of the state's case-in-chief caused this to happen, losing any strategic advantage that might have been gained had defense counsel kept their trial strategy to themselves and not bending to pressure.

43. Don wished to testify in his own behalf and was slated to do so. He was on the defendant's designation of witness list. R.191-93. He was never informed by defense counsel that he had a constitutional right to testify. In fact, on the evening before he was called to testify, he was told by defense counsel that he would not testify. Don felt that he had no say in the matter. R.1097,1092,1088-87,1085-84,1080. In many instances he was the only one who could refute the testimonies of the co-conspirators and Ted Anthony. Davey made the call to Magna at 9:08 p.m. on September 11, 2004. There was never any mention of killing his exwife to either Brinkerhoff or Desvari. Rather, he would have testified that the Ben, Brinkerhoff, and him were at the house he was renovating and they were working for him. All that was discussed was the work assignments of these two. R.1083.

44. Don never told Ted he wanted his exwife killed. He didn't trust Ted, and was definitely not his friend. He never asked Ted to find a hit man or other similar inquires. Any time Ted, Idrese, and Don were together, a hit man was never discussed. Ditto for killing his

exwife. One time Ted called him and asked about a hit man. Don asked what the hell he was talking about and hung up because the Ted was making no sense. R.1088.

45. At the preliminary hearing, Ben Desvari testified that the cell phone he used belonged to Davey. Davey arrived at Don's Salt Lake City home on September 11, 2004 prior to 9:00 p.m. and during his conversation with Don requested to use Don's cell phone. Davie made the phone call to Magna at 9:08 P.M. *See* Affidavits of Don R.1091; Glenda R.1105-03; & Diane R.1061,1059.

46. Had Don testified, he would have stated that he did not call Ben during the evening of September 11, 2004; rather, he called the number belonging to Davey and spoke to him in order to arrange a meeting that evening to discuss a construction project. Don did not call Brinkerhoff or meet with him on that day or evening. His testimony would have been that he never asked anyone to kill his exwife. He never offered any money to anyone to kill his exwife. He never met with anyone to discuss killing his exwife. He never conspired with anyone to kill his exwife. He had written contemporaneously when the events described therein occurred, which would have assisted in creating reasonable doubt. *See* Affidavit of Don R.1088-82.

47. While incarcerated in the Tooele County Jail, Don was in the cell next to Brinkerhoff who told him that when and if Don saw the police reports, to disregard them, that the police were pressuring him into saying what they wanted him to say, and that he would not testify to back up anything he had told the police because it was all lies and crap and not to worry about anything because Don had done nothing wrong. This was conveyed to defense

counsel; however, they never cross-examined Brinkerhoff about it or called Don to testify. R.502:393-423,424-426. *See* Affidavit of Don R.1079.

48. Don, Glenda , and Diane Martin met with Ben Desvari at a park in Murray right after September 11, 2004. During that meeting, Ben Desvari told Don, Glenda , and Duane that Don was innocent, that he had nothing to do with any plot to harm Susan Hyatt, that the police were leaning on him to finger Don or else he would be prosecuted. Ben was very adamant about Don not being involved in any such plot, that he was innocent. *See* Affidavits of Don R.1079-78, Glenda R.1110-08, Diane R.1063-62, and Wally Bugden remand testimony R.1031:50-51.

49. Glenda called Don's land line on September 11, 2004, at about 10 minutes after 9:00 p.m. and the phone was answered by Davey who told her he was on Don's cell phone. She heard Davey's part of the conversation on the cell phone where he agreed to buy some stuff and would be driving to Magna shortly to get it. Her testimony was critical to refute Brinkeroff's testimony that he met with Don in Magna on the evening of 9/11. R.1105-1103.

50. It is the testimonies of Don and Diane that Ben met them at Diane's house and told them that Don had nothing to do with any plot to kill his exwife, that Don did nothing wrong, that he was innocent, and that pressure was being put on Ben by the police to make statements about Don he didn't want to. *See* R.1078-77, and Affidavit of Diane.[2] R.1064-63.

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[2] During the remand evidentiary hearing, defense counsel stated that Diane Martin did not tell him about her seeing Ben Desvari at the park or having conversations with him and Don in her home. Ms. Martin indicates she told this to David Brown, Don's previous attorney. R.1064-62:¶¶ 2-4. Defense counsel testified he spoke to David Brown about the case but could not remember what was told him. He also did not know Greg Marcum, Mr. Brown's investigator. R.1031:11,12. Ms. Martin testified she told Doug Maack, defense

51. Diane Martin also called Don's home line on September 11, 2004 at about 9:30 p.m., while Davey was there (she heard him in the background). She spoke to Don for about an hour. R.1062-63:¶ 6. Ditto for Glenda calling Don and hearing Davey in the background. R.1105-03. Had she testified, she would have stated there is no way Don could have met Brinkerhoff in Magna during the evening of 9/11/04. R.1100.

52. Melody Oliver stated how jealous Ted Anthony was. She knew that Ted had set up others by lying about them to the police in order to receive favorable treatment and that he had received favorable treatment. Ted swore to her he would get even with Don, he would destroy him even if he had to lie about him to get Don convicted and out of Melody's life. R.1055-56:¶¶ 4-9. She was not called as a witness.

53. Defense counsel never advised Mr. Millard that he had a constitutional right to testify. R.1031:26; Don affidavit R.1085-84,1080. Defense counsel never advised Mr. Millard that his decision to testify could trump defense counsel's decision not to have him testify. R.1031:26; R.1085-84,1080. Defense counsel never had Don Millard execute any writing indicating a waiver of his constitutional right to testify. R.1031:27. Defense counsel never informed the trial court that they had advised Millard of his constitutional right to testify and

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counsel's PI about the meeting with Desvari in her home, her involvement with the meeting with Desvari at the Murray park, and her call to Don at his Salt Lake City apartment on 9/11/04 after 9:00 p.m. when she heard Davey saying goodbye to Don. Defense counsel admitted he did not know the results of Diane's meeting with Maack. R.1031:53. Don's trial counsel never investigated her testimony. R.1062-61. Doug Maack was not called to rebut Diane's testimony. Moreover, Diane could have provided an alibi to Brinkeroff's statement that Don met him in Magna on the evening of September 11, 2004 – she said this was impossible – she spoke to him at his Salt Lake apartment for almost an hour. R.1059:¶17. Her testimony was never investigated and she was not called as a witness. R.1031:52.

that he waved that constitutional right. R.501-505. Don wanted to testify, was aching to testify for he was the only one who could fill in the missing pieces to provide the jury with reasonable doubt, especially since defendant counsel failed to investigate and subpoena Davey Desvari ("Davey"). R.1097,1087,1084 (failed to subpoena Davey), & 1076. Don was constantly prepared to testify by defense counsel and was on the witness list. R.1097,1084.

SUMMARY OF ARGUMENT

Defense counsel, in opening statement, promised the jury that Don, Glenda , and Duane would testify. R.502:250,253,255. Don and Glenda didn't testify. Such constitutes ineffective assistance of counsel. During defense counsel's motion to dismiss, counsel stated unequivocally that Don conspired with the co-conspirators to harm Susan. R.504:614. This admission was an extremely serious breach of counsel's duty to zealously represent Don's interests, and for that reason Don is presumed to have been prejudiced. Defense counsel never advised Don he had a constitutional right to testify at trial. R.1031:26, R.1085-84,1080. Don had the right to present all competent evidence in his defense as is a right guaranteed by the due process clause of the Utah State Constitution, Art.I, §. 7. By failing to advise Don of that right and by preventing him from exercising that right, defense counsel was ineffective. Defense counsel stipulated to Don and Ben's phone records being admitted at the close of the State's case-in-chief when none of the State's witnesses testified from the records and couldn't remember the phone numbers. R.503:600-01. The phone number exhibits were never received by the court via the State's motion. Throughout his closing argument, the prosecutor testified from the phone records without any objection from defense counsel. R.504:755-784,840-852. Such conduct constitutes

ineffective assistance of counsel and prosecutorial misconduct. During trial, defense counsel allowed Ted to continually testify about things Idrese told him without any objection to this critical hearsay testimony. In fact, defense counsel asked Ted questions about what Idrese said to him furthering the use of hearsay testimony. ¶¶ 26-42, Statement of Facts. Such constitutes ineffective assistance of counsel. Defense counsel never investigated or called material witnesses to testify for Don. They never investigated the facts and were not prepared for trial. R.1065-1098. The remand findings attempting to exonerate defense counsel and vilify Don are unsupported by the evidence.

ARGUMENT

I. WHETHER DEFENSE COUNSEL'S UNFULFILLED PROMISE TO THE JURY TO PROVIDE DON'S AND HIS MOTHER'S TESTIMONIES CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL

In her opening statement to the jury on December 12, 2005 Don's defense counsel made several statements to the jury which planted the seed in the jury's mind that Don would testify during trial. *See* Statement of Facts, ¶ 1 for these statements.

Although no Utah case was found directly on point, there are cases from other jurisdictions which establish that, absent unforeseen circumstances, telling the jury in opening argument that Don and others will testify and then not doing so constitutes ineffective assistance of counsel. For example, in ***Ouber v. Guarino***, 293 F.3d 19, 27 (1st Cir. 2002) trial counsel initially told the jury that defendant would testify but then later advised him not to testify. The reviewing court found ineffective assistance of counsel "in the absence of unforeseeable events forcing a change in strategy." 293 F.3d at 27. ***In People v. Briones***, 352 Ill.App.3d 913, 287

Ill.Dec. 909, 816 N.E.2d 1120, 1125 (Ill.App.2004) the reviewing court found ineffective assistance of counsel where counsel had told the jury defendant would testify and then changed her mind. In the *Briones* case the court based its decision upon **trial counsel's** inability "to show either that the defendant decided not to testify or that, "because of unexpected events, sound trial strategy required her to break her promise that the defendant would testify." *Briones* at 1125. In ***United States v. Leibach***, 347 F.3d 219, 256 (7th Cir. 2003) during opening statements defendant's trial counsel told the jury that defendant was not in a gang and that he would so testify. No such testimony was presented during the trial. The court found ineffective assistance of counsel in that there were no "unforeseeable events" which influenced trial counsel's decision. The court in ***State v. Zimmerman***, 823 S.W.2d 220, 226 (Tenn.Crim.App.1991) found ineffective assistance of counsel arising from counsel's statements during opening statements that defendant, a psychiatrist, and others would testify that defendant was a battered wife and that she killed in self-defense. Trial counsel later advised defendant not to testify and presented no such evidence. The court determined that there was no "sudden change" in the case which would have justified changing trial strategy.

Thus the foregoing cases are consistent with the proposition that absent something unforeseen or unexpected, trial counsel's making an unfulfilled promise to the jury that certain evidence will be provided, and particularly when the defendant himself is to provide it, will constitute ineffectiveness of counsel. Such is the case here. Testimony was promised to the jury from Don–and from his parents–and no testimony whatsoever was provided from Don and his mother, and but little from his father unrelated to the impeachment of Ben Desvari and

similar issues. Certainly not what was promised to the jury in defense counsel's opening statement.

It may be argued that defense counsel were surprised or overwhelmed by the telephone records presented by the State at trial. However, the facts indicate otherwise. First, they knew about the phone numbers from the State's opening statement and the second day of trial. R.502:379,320,386. Defense counsel had the phone records in their possession for a good ten months before trial. R.1031:31. Defense counsel testified he did not find a material variance in the phone records compared to the testimonies of Ben and Brinkerhoff. R.1031:42. Defense counsel admitted she had gone over the phone records from day one, broke down the phone numbers, and made notes. R.1031:170,174. Moreover, the identity of the Magna phone number in question, 801-508-7514, could have been discovered by calling it, looking in the phone book for location based on prefixes, or otherwise investigating it by a reverse directory. (Defense counsel's closing argument on the 4th day of trial clearly demonstrates defense counsel knew that this number belonged to Brinkeroff's sister; therefore, no real surprise. R.504:833,835,838.) Their surprise, as they are now claiming, indicates they failed to investigate these phone records and adequately prepare for trial. At the last minute and without any legitimate reason, they simply refused to allow Don to testify even though he had a feasible explanation for this phone call. *See* R.1086-1088.

II. WHETHER DEFENSE COUNSEL'S ADMISSION TO THE COURT OF THE EXISTENCE OF A CONSPIRACY INVOLVING DEFENDANT AND THAT THE OBJECT OF THE CONSPIRACY WAS TO HARM DEFENDANT'S EX-WIFE CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL AND PRESUMES PREJUDICE TO DEFENDANT

The State ostensibly rested its case against defendant on December 13, 2005, and the next morning, counsel for the State and defendant were in the judge's chambers,[3] at the court's behest. During the discussions in chambers the State brought to the court's attention that it wished to recall a witness and that "they [defendant's counsel] have a motion to dismiss." R.504:612-614. Rather than hearing defendant's motion to dismiss in open court, or even waiting until the State had actually rested, the judge heard the motion to dismiss in chambers, which was identified by defendant's co-counsel as "Defendant's Motion to Dismiss the Second Conspiracy Charge." R.504:612. The "gist" of defendant's counsel's argument was that there was in reality only one conspiracy with different co-conspirators, not two conspiracies as charged. In a sellout to appellant, they stated (R.504:614) as follows in this regard (R.504:614):

> And the idea that the State would make this into two different conspiracies, I think, is contrary to the evidentiary picture and contrary to the law.

Immediately after making the above statement, Mr. Bugden stated:

> ***I think there was a conspiracy. The goal of the conspiracy was to harm Ms. Hyatt. And Mr. Desvari was enlisted for that purpose in the beginning and was unsuccessful. He continued to work with Mr. Millard and work with Mr. Brinkerhoff and Mr. Desvari continued to have a role.***

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[3]It is Don's testimony he was not present during this exchange. The Trial Transcripts reflect his presence, although the Jury Trial Minutes indicate that only counsel for the parties and the court were present. Moreover, prior to the state's close of its case-in-chief, defense counsel notified the trial court that it was going to make a motion to dismiss. The trial court asked that the motion be made in chambers prior to the state closing. Defense counsel acquiesced. However, the state, hearing the motion to dismiss prior to its close, called the very witnesses and had them testify to the very deficiencies defense counsel previously brought to their attention. This is nothing more than ineffective assistance of counsel, informing the state in advance what the deficiencies in their case were. In other words, defense counsel would rather acquiesce to the trial court's demands than effectively represent their client. The prejudice is apparent.

This admission by Don's counsel was an extremely serious breach of his counsel's duty to zealously represent his interests, and for that reason Don is presumed to have been prejudiced. The case of ***State v. Holland***, 921 P.2d 430 (Utah 1996) describes an attorney's obligation to effectively represent his/her client as follows at 435-436:

> To be effective, an attorney "must play the role of an active advocate, rather than a mere friend of the court." [citing] *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 830, 833, 83 L.Ed.2d 821 (1985) Unless an attorney represents the interests of a client with zeal and loyalty, the adversarial system of justice cannot operate. [citing] *Holland II*, 876 P.2d at 359 (citing in turn] *United States v. Cronic*, 466 U.W. 648, 656-57, 104 S.Ct. 2039, 2045-46, 80 L.Ed.2d 657 (1984); *von Moltke v. Gillies*, 332 U.S. 708, 725-26, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948) (plurality opinion). <u>At the very least, this duty of loyalty requires attorneys to refrain from acting as an advocate against their clients, even in a matter unrelated to the case for which the attorney has been retained</u>. [citing *Holland II*, 876 P.2d at 359-60] [emphasis added]

In the *Holland* case defendant's counsel had called defendant Holland to testify at the penalty hearing in the unrelated capital homicide case of *State v. Taylor*, in which Holland's counsel also represented defendant Taylor. Counsel's objective in so doing was "to demonstrate that when compared to Holland, Taylor did not deserve the death penalty." *Holland*, 921 P.2d at 432.

In explaining its conclusion that these actions amounted to ineffective assistance of counsel, the court stated, at 432.

> . . . [counsel] took a position in the *Taylor* case that was directly contrary to Holland's interest when he sought to have Holland testify to establish a foundation for arguing that Holland was a "*prime candidate for the death penalty*" whereas Taylor was not. [citing] *Holland II*, 876 P.2d at 359. By asserting that Holland deserved the death penalty, [counsel] not only acted directly contrary to Holland's interest, but he aligned himself with the State's position. These actions also clearly render Levine's performance as Holland's counsel deficient according to *Strickland* standards.

Counsel's admission to the judge and counsel for the State in this case that defendant was guilty of a criminal conspiracy to harm his ex-wife was no less a serious alignment with the State against defendant. The foregoing statement of defense counsel evidences an actual conflict of interest similar to that in the *Holland* case, where counsel had attempted to sacrifice the interests of his client Holland to serve the interests of his other client Taylor. In this case there of course were not separate clients, but there were separate charges, and defense counsel sacrificed the interests of Don in maintaining his innocence of any conspiracy in either count (which is of course what he would be expected to do as Defendant's advocate) to serve the interest of getting rid of Count II. Counsel admitted not only the existence of a conspiracy to the court, but also that the goal of the conspiracy was to harm Ms. Hyatt, basically agreeing with the State's case. The admission was not made *arguendo*. It was a forthright statement of fact. There were no cautionary statements or limitations such as "while Defendant denies the existence of a conspiracy altogether" or "assuming *arguendo* a conspiracy existed," Mr. Bugden admitted the existence of what he characterized to be an overarching conspiracy to encourage the court to dismiss the second conspiracy charge. Because of counsel's admission of the existence and goal of a conspiracy, it was tantamount to counsel's decision in the *Holland* case to sacrifice one client's interests for those of another. Counsel, by admitting the existence of a conspiracy, acted directly contrary to defendant's interest and allied himself with the State's position that there was in fact a conspiracy, regardless of whether it was characterized as two separate conspiracies or just one. Just as in the Holland case, this renders counsel's performance as defendant's counsel deficient "according to *Strickland* standards."

The *Holland* court then considered the issue of prejudice to Holland, the second prong of the *Strickland* test (***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, reh'g denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984)), as follows at 436:

> We need not examine whether such performance resulted in prejudice to Holland. 'Once the Court conclude[s] that [the defendant's] lawyer had an actual conflict of interest, it [shall] refuse to indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' [citing] *Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980) [quoting *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467-68, 86 L.Ed. 680 (1943)); other citations omitted. [Emphasis added.]

Counsel's admission of the elements of a crime with which defendant was charged evidences a conflict which demonstrates a denial of defendant's right to the effective assistance of counsel and, in and of itself, should entitle defendant to a new trial.

III. WHETHER DEFENSE COUNSEL'S FAILURE TO ADVISE DON HE HAD A CONSTITUTIONAL RIGHT TO TESTIFY AND REFUSAL TO ALLOW HIM TO TESTIFY AFTER TELLING THE JURY HE WOULD CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

A. Failure To Advise Don He Had A Constitutional Right To Testify

During the remand hearing, defense counsel admitted Don was never informed he had a constitutional right to testify. R.1031:26. He did admit that he told Don the choice was his. R.1066. Not being made aware of the origin of his right to testify, Don could not be expected to know that he could testify even if his defense team told him he could not. The law regarding waiver of a right is very clear as is set forth in ***Rowley v. Marrcrest Homeowners' Ass'n***, 656 P.2d 414, 418 (Utah 1982) (at 418):

> 'A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage; a knowledge of its existence and an intention to relinquish it. It must be distinctly made . . . .

Since the defense team never advised defendant of his constitutional right to testify, he never knew he had an absolute right to testify or exactly what the right was or the context in which the right could be asserted. There was an existing right, benefit, or advantage by defendant to testify. Even the defense team's December 2, 2005 letter [R.1066] stated the obvious: that it was essential for defendant to testify to fill in the gaps. Moreover, the testimonies of Mr. Bugden and Ms. Isaacson are all self-serving on this point and are not corroborated by their own correspondence to defendant. Rhetorically speaking, if they had advised defendant he had a right to testify, why wasn't the word "right" used in their December 2, 2005 missive. On the other hand, Don's affidavit and his testimony are clear that he intended to testify, that he wanted to testify, and that he was never informed that he had a right to testify. R.1097,1088,1087-85. Moreover, counsel told him the decision was ultimately his; however, there is nothing in the record about the advice counsel gave Don in order for him to make an informed decision, that would be ultimately his.

B. Defense Counsel's Refusal To Allow Don To Testify In His Own Defense

Every criminal defendant has several related federal constitutional rights to present a complete defense to criminal charges against him. *See* ***Crane v. Kentucky***, 476 U.S. 683 (1985)

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process of confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense' . . . . We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard." (Citations omitted.)

The Constitution of Utah provides parallel protection. An essential element of due process provided by article I section 7 of the Utah Constitution is the "fair opportunity to submit

evidence." ***Christiansen v. Harris***, 163 P.2d 314, 317 (Utah 1945). ["[T]he defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art.I, §. 7"[.] (This was denied Don as set forth herein.) ***State v. Harding***, 635 P.2d 33, 34 (Utah 1981). Article I § 12 of the Utah Constitution provides numerous trial rights which also pertain. It states,

> In criminal prosecutions the accused shall have the right to appear and **defend in person and by counsel**, to demand the nature and cause of the accusation against him, to have a copy thereof, **to testify in his own behalf**, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. [Emphasis added.]

Utah Code Ann. § 77-1-6 similarly provides,

> (1) In criminal prosecutions the defendant is entitled:
> (a) To appear in person and defend in person or by counsel;
> . . .
> (c) To testify in his own behalf;

Don's affidavit (part of the evidentiary record) indicates that he was being prepared and prepped to testify. However, on the eve of him testifying, he was summarily told that his counsel would not allow him to testify, that enough reasonable doubt had been established and counsel did not want that reasonable doubt to be placed at risk by Millard testifying. *See* R.1097,1088,1087-1084.

One of the most fundamental criminal defense rights is provided by our constitutions and code is a defendant's right to testify. *See* ***Crane v. Kentucky***; ***Harding***; ***Christiansen***; and Utah Code Ann. § 77-1-6, *supra*.

By failing to advise Millard that he had the **right** to testify at his trial and that only he,

not his counsel, ***State v. Hernandez***, 2005 UT App 546, 128 P.3d 556, ¶ 17, shows what is required:

> To show ineffective assistance of counsel, defendant must show that his counsel "(1) rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him."

An objective standard of reasonable professional judgment demands that only the defendant can exercise or waive his right to testify at trial, that he be told he has this fundamental right. By failing to so advise Don, trial counsel rendered deficient performance falling below an objective standard of reasonable professional judgment. There is no question that Don did not testify and there is no question he was going to testify – he was a designated witness. R.191-93. Trial counsel cannot waive a constitutional right for their client. Yet, this is exactly what trial counsel did. Don had no prior criminal history. He made no prior inconsistent statements. Entered into evidence was a tape of his interview with Detective Chamberlain. State's Exhibits 1 & 2. So, Don had already spoken; however, with a twist of assumptions by the detective, making it imperative that Don testify.

Moreover, Don wanted to testify. He was shocked when told he would not be testifying. His testimony was critical in this case, so the jurors could hear him deny that he conspired to kill his exwife, see him face the prosecutor's cross-examination, and have the opportunity to hear him speak and confirm that he was straight forward and honest. It was important for the jurors to hear his testimony about the phone call that the state emphasized without objection from trial counsel. As it was, the only evidence the jury heard about the conspiracy was the unchallenged testimony of the co-conspirators. Only Don had the personal knowledge to directly

refute the testimony of the co-conspirators and Ted Anthony. However, because of the ineffective assistance of his counsel, Don was denied the right to face the jury and counter the allegations against him. The prejudice is plain (R.1080,1069). Without his testimony, the evidence that there was a conspiracy to kill his exwife and that an attempt had been made was all one-sided without any rebuttal whatsoever.

Another consideration is that Don's testimony concerning what Brinkerhoff said to him in the jail is important, set forth in ¶ 47, Statement of Facts [R.1079]. Yet, it was never heard by the jury. Had the jury heard this direct challenge to Brinkerhoff's veracity, it is probable it would have produced reasonable doubt.

Moreover, by advising Don he had a right to testify and allowing him to do so may have removed the prejudice him caused by his trial counsel statement to the court that he believed that Don was guilty of conspiracy. R.504:624. Certainly, this statement by defense counsel fell below the objective standard of reasonable professional judgment. Obviously, there is no tactical explanation for making such a statement on the record to the trial court. *See* ***State v. Moritzsky***, 771 P.2d 688, 692 (UT App 1989). And, as has been stated hereinabove, prejudice is presumed.

Finally, Don's affidavit sets forth what he would have testified had he been able to do so. R.1088-1082,1080-1076,1072-71. The content of his testimony would have gone a long way to creating reasonable doubt with the jury. Without the benefit of this testimony, no such doubt was created. It was an arrogant assumption for defense counsel to not have Don testify because they thought they had established enough reasonable doubt. This definitely falls below the

objective standard since trial counsel made a critical decision to waive Don's direct contradicting testimony based upon nothing more than mere speculation. R.1085,1074; R.1102.

See ***State v. Brooks***, Utah App., 833 p.2d 362, 364 (1992):

> The right of criminal defendants to testify and present their version of events in their own words is fundamental. [citing] *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987). This fundamental right is guaranteed by both the United States Constitution [citation omitted] and the Utah Constitution. [citation omitted] The defendant retains ultimate authority in deciding whether or not to testify. [citing] *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). Generally, waiver of a fundamental right must be knowing, intelligent and voluntary. [citing] *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1024, 82 L.Ed. 1461 (1938)

Had he been advised of the fact he had a right to testify, he would have done so. R.1097. (Don had nothing to lose and everything to gain by testifying. Defense counsel has a motive to state they told Don the decision to testify was ultimately his; however, Exhibit A to his affidavit [R.1066-1065] does not talk of a right to testify and the wording is vague, especially to a non-lawyer. Certainly there is no mention of a right. If there is any error, it should be on the side of Don due to this deprivation of a fundamental right.)

IV. WHETHER DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S WRONGFUL ARGUMENTS AND ALLEGATIONS OF FACT CONCERNING THE PHONE RECORDS IN EXHIBITS 19, 20 AND 21 WHEN THOSE EXHIBITS WERE NEVER ADMITTED INTO EVIDENCE CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL AND WHETHER SUCH WRONGFUL ARGUMENTS CONSTITUTE PROSECUTORIAL MISCONDUCT

A. Exhibits 19, 20 and 21 were never properly admitted into evidence in the first place and were therefore not a proper subject of commentary by the prosecutor

The process by which the court receives evidence is course governed by the Utah Rules

of Evidence, of which several provisions are of particular importance. For instance, the following excerpts from **Rule 103** makes it clear that the court, and not the parties, determines what evidence is received and what is excluded:

> (a) Error may not be predicated upon a ruling which admits or excludes evidence . . .. [emphasis added];
>
> (1) In case the ruling is one admitting evidence, ... [emphasis added]
>
> (2) In case the ruling is one excluding evidence, ... Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. [emphasis added]
>
> (c) In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. [emphasis added]

The actual mechanics of offering and receiving exhibits do not seem to be stated or outlined in the Utah Rules of Evidence, although the procedure is well known to an experienced trial attorney, and is outlined as follows in 1 *McCormick on Evidence*, ch. 6, p. 246 (Kenneth S. Broun, ed., Thomsen/West 6th ed. 2006):

> The procedures for handling exhibits vary to a degree not only from jurisdiction to jurisdiction but also even between judges sitting in the same jurisdiction. However, the following generalization hold true in most jurisdictions. After laying all the required foundations or predicates, the proponent tenders the exhibit to the judge by stating "Plaintiff offers this (document or object, describing it), marked 'Plaintiff's Exhibit no. 2' for identification, into evidence as Plaintiff's exhibit no. 2." At this juncture, the opponent can object to its reception in evidence, and the judge will rule on the objection. Assuming the judge rules that the exhibit will be accepted in evidence, if it is a writing, at may be read to the jury by the counsel offering it or by the witness.

Several cases, from Utah and other jurisdictions, are instructive concerning this issue. In ***State v. Lamorie***, 610 P.2d 342 (Utah 1980) the prosecutor in the case had successfully

attempted to prove defendant's guilt of possession of a dangerous weapon in Utah while on parole from the State of Colorado by offering certified copies of (1) defendant's Colorado parole agreement and (2) defendant's Judgment of Conviction. 610 P.2d at 344. In vacating the trial court's conviction and remanding for a new trial, the Supreme Court at 346 concluded that

> [b]y Utah law, any document, to be received in evidence, must be authenticated. [citation omitted] Absent such authentication, no competent evidence is before the court that the document is what it purports to be.

In ***People v. McClerren***, Ill.App.5 Dist., 554 N.E.2d 776 (1990) plaintiff during discovery submitted requests for admission to defendant, which were not timely responded to. Prior to trial, plaintiff received the court's summary determination that the "Request for Admissions filed by the state . . . is deemed admitted, in total." 554 N.E.2d at 777. However,

> at trial plaintiff failed to introduce the admitted facts into evidence. [citation omitted] Thus, when plaintiff's counsel referred to the facts deemed admitted during closing argument, the court ruled that those facts were not before it. [citation omitted]

The appellate court affirmed the decision of the trial court and at 778 emphasized the absolute requirement that the fact-finder only consider only "evidence" in its deliberations:

> Courts are to decide a case only on the evidence in that particular case. [citing] *People v. Yarbrough* (1982), 93 Ill2d 421, 67 Ill.Dec. 257, 444 N.E.2d 493) Neither testimony nor physical objects are evidence unless they are produced, introduced, and **received** in a trial. Here, the facts admitted by the defendant's failure to respond to the request for admission were not produced, not introduced, and not received in the trial of the case. [emphasis added]

In ***State v. Torres***, 87 P.3d 572,582 (Okla. 2004) the Supreme Court, in affirming a trial court's decision to forfeit an appearance bond, observed appellant had failed at trial to offer

proof at a *nisi prius* hearing supporting its contentions, concluded as follows:

> *Appellant offered tantalizing suggestions regarding the existence of facts critical to its case, but failed to prove those facts by admissible proof.* It would have been a simple matter to have done so. *It is elementary that evidence must be offered and admitted at a hearing in which fact issues are in dispute.* In sum, that which counsel desires to use as proof must be adduced in a proper manner in the adversarial proceedings conducted to resolve the disputed facts on the merits of a claim or defense. [citation omitted] Appellant's failure to adduce for the record any proof of facts critical to its defense against the state's demand is fatal to its cause. [emphasis in italics in original; underline emphasis added]

Such is the situation here, except the State failed to "adduce for the record" the proof of facts critical to its position. In this case, the record [R.503:600-01] indicates the following, **and only the following**, concerning the State's exhibits 19 [Phone Records Sprint], 20 [Phone Records Sprint] and 21 [Phone Records Cricket]:

> MR. SEARLE: Judge, pursuant to stipulation by counsel, we move for the admission of all the phone records. These phone records come from Sprint and Cricket.
> (Mr. Searle works with the clerk to get some packets of documents marked as Exhibits.)
> Judge, State's 19 are Spring phone records.
> State's 20 are Sprint phone records.
> State's 21 are phone records from Cricket Corporation, a phone company.
> With the Court's indulgence.
> (A discussion between Mr. Searle and Mr. Cundick.)

There is no stipulation evident on the record, so it cannot be determined from the record what the "stipulation by counsel" referred to. Such a stipulation could have been to authenticity or it could have been to admissibility, or it could have been to both, but nowhere are the terms of the "stipulation by counsel" reflected. Furthermore, the phone records were not "offered" as exhibits, but were presented to the court by Mr. Searle by motion. While it is true that there was no objection on the part of defense counsel to the motion to admit the exhibits, it is likewise

true that the motion was never granted by the court. These phone records should not be part of the record since, to be received in evidence, they must be authenticated.

Thus, we are left to speculate concerning the terms and effect, if any, of the stipulation referred to by Mr. Searle, but we need not speculate concerning whether the phone records were admitted into evidence. **They were not**. At no time did the court utter the word "received" over exhibits 19, 20 or 21 even if this Court concludes that Mr. Searle's motion to admit them is the functional equivalent of offering them. Never did the trial court state that exhibits 19, 20 and 21 were admitted into evidence by granting Mr. Searle's motion. The best that can be said of exhibits 19, 20 and 21 is that they were offered but never received. While it is true that the exhibit list kept by the court's clerk indicates that exhibits 19, 20 and 21 were "offered" and "received," the authorities cited above and in particular Utah Rules of Evidence 103 seem clear that it is the court which admits or excludes evidence. Not the clerk. Not the attorneys. The only logical conclusion supported by the record then, is that exhibits 19, 20 and 21 were never entered as exhibits. That being true, they were never evidence in the case, could not and should not have been considered by the jury, and could not properly be commented upon by Mr. Searle in his closing argument. Defense counsel's failure to object to Mr. Searle's commentary on the phone records and the jury's consideration of them in coming to its verdict constitutes ineffective assistance of counsel.[4]

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[4]In anticipation of the State's allegation that the foregoing argument might fall afoul of the "invited error" doctrine identified in ***State v. Layman***, 953 P.2d 782, 785 (1998), Don points out that the trial court was not led into the claimed error by defense counsel. Rather, it was the State's attorney who failed to make certain that his own exhibits were admitted into evidence. Don's complaint against his own attorneys for ineffective assistance is grounded in their failure to object to comments made by the State's attorney during his closing

B. The telephone records contained in Exhibits 19, 20 and 21, which were never admitted into evidence, were pivotal and crucial elements of the State's case against Defendant, without which there is at least a reasonable probability that Defendant would not have been convicted

The prosecution's theory of the case was primarily that the testimony of the State's witnesses was corroborated by physical evidence, including the telephone records, which the jury could rely upon even if they could not rely upon the testimonies of Desvari, Brinkerhoff and Anthony, as evidenced by the following statements from Mr. Searle's closing argument:

> You take the statements of individuals and then you look at those statements, you corroborate those with the physical evidence – facts which may be set in stone, facts which can't be altered, facts which can't be changed, regardless of how bad someone may want them changed. That's what I'm asking you to do. (R.504:755)
>
> . . . let's begin with the defendant's statement that night to the police. And we're going to look at all the telephone calls, to who [sic] those calls were made, as to when those calls were made. Let's look at these telephone calls and see if they support his statement. (R.504:755)

After quoting excerpts from Don's statement to the police on 9/11, Mr. Searle then commented to the jury that none of Defendant's statements to the police added up (R.504:755,756,757,758) and began to discuss the telephone records. Mr. Searle argued that the these records circumstantially belie Don's statements to the police and was not involved in a conspiracy to cause her death by stating that the following telephone calls took place:

1. September 11, [2004] at 8:35 in the morning, "Ben [Desvari] places a call to phone number -6857, the defendant's phone number. One phone call,

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argument concerning the phone records, which were never admitted into evidence. Thus it cannot be said that Don's attorneys led the court into error.

8:35 in the morning."[5] (R.504:758);

2. "At 4:23, a phone call from Ben Desvari to -6857, the defendant, lasting 18 seconds.[6] Immediately thereafter, we have a return phone call, -6857, at 4:30 in the afternoon." (R.504:759);
3. "At 6:07 there's a phone call lasting three minutes and 50 seconds from the defendant to Ben Desvari.;"[7] (R.504:759);
4. "At 6:14 Ben Desvari calls the defendant and they talk for three and a half minutes." (R.504:759);
5. "At 6:46, Ben Desvari called the defendant. 6:46, just less than an hour before Susan Hyatt is attacked at her home. They had talked several times throughout the day." (R.504:759);
6. "At 8:51, Ben Desvari calls the defendant. It was after the attack. 8:51 he calls the defendant." (R.504:759);
7. "At 8:54, Ben Desvari receives a phone call from (801) 508-7514,[8] James Brinkerhoff, in Magna." (R.504:759);
8. "At 8:58 he receives a phone call from James Brinkerhoff. Area code (801) 508-7514 in Magna. Again, this is from Ben Desvari's house." (R.504:759);
9. [Ben Desvari] calls Susan Hyatt's home, like he said, twice: 9:30 and 9:33; 10 seconds, 12 seconds." (R.504:760);
10. He hands up from Susan Hyatt's phone, Ben Desvari, and guess who gets the next phone call? How about the defendant? He gets the very next phone call at 9:34." (R.504:760);
11. Mr. Searle then comments (R.504:760):

"So Ben has received two phone calls, which he told you was from James Brinkerhoff, saying, it went bad, didn't do it, it's a mess."
"Ben turns around. He's going to verify this. He's [sic] calls Susan Hyatt's home, hears the police, hangs up; calls back, and he hears the police and he hangs up."

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[5]This allegation is factually incorrect. The call was placed from Defendant's phone.

[6]This allegation is factually incorrect. The call was placed from Defendant's phone.

[7]This allegation is factually incorrect. The call was placed from Desvari's phone. For all of the above, see State's exhibits 19, 20, and 21.

[8]This telephone number (801) 508-7514 was **never** identified during the trial as belonging to James Brinkerhoff, and "supplying" this information to the jury is nothing short of testifying on the part of the prosecutor, which was **not objected** to by Defendant's counsel. Ditto for the next paragraph, ¶ 8.

"He turns around and who does he call? He immediately calls the defendant – all after the attack."
"At 10:40 – now, again, the defendant has not spoken with the police. All of these phone calls happened prior to his: [quoting Defendant] 'I don't know what's going on; they shouldn't know where she's at; I would be surprised if they did.'"
"At 10:40 Desvari doesn't call. This caller ID show in-coming calls. So as you look at the phone records, look at the in-coming calls."
"At 10:40 defendant calls Desvari and they talk for over six minutes. Still he has not spoken with the police. But he talks on how many occasions with Ben Desvari after the attack on Susan Hyatt, after Benn tells you he was made aware of the attack on Susan Hyatt by Brinkerhoff. At 10:58, at 10:58 Desvari calls Brinkerhoff again."
"Then we've got the interview. Then we've got the interview with the police a11:30: [quoting Defendant] 'I don't know what's going on.'"
"[quoting Defendant] 'Susan was attacked? I'm clueless. Somebody help me out here.'"
"The police interview ends. At 9-12, 11 o'clock in the morning, a phone call gets made. After the police interview, a phone call is made from Ben Desvari to the defendant lasting over four minutes. That call lasted until 12:15."
"At 12:20 the defendant calls back Ben Desvari and they talk for over five minutes."
"The statement to the police is in stone. It's on videotape."
"[quoting Defendant] 'I have no idea what's going on; somebody help me. Somebody attacked Susan? Somebody help me and let me know what's going on.'"
"Well, this is Ben Desvari's phone number."
"What about the Defendant's phone number? Let's start with this one. There are two separate, as given by Sprint. The phone number is -6857."
"Again, the phone call at 4:57 [on September 10] to Ben Desvari; duration, one minute 40 seconds."
"A phone call on 9-11 at 7:35; duration, two minutes eight seconds."
"A phone call on 9-11 at 4:23 to Ben Desvari; duration, 27 seconds."
"A phone call at 6:07 to Ben Desvari; duration, 250 seconds – over four minutes."
"At 9:08, at 9:08, Susan has been attacked. He has received numerous phone calls. Who does he call? At 9:08 he calls (801) 508-7514. Who's at that number? James Brinkerhoff. And how long do they talk? Five minutes and 20 seconds. He talks with James Brinkerhoff for over five minutes before he goes and talks with the police."

At no time during this lengthy closing argument by Mr. Searle did either of Don's

attorneys interpose any objections, they let him testify, including any of the following:

1. The fact that Mr. Searle presumed and argued that the persons making and receiving the telephone calls reflected in the exhibits at the telephone numbers were the individuals Mr. Searle associated with those numbers, but without any testimony from his witnesses or anyone else on the record to support such conclusions;
2. The fact that there was no evidence on the record to identify the telephone number (801) 508-7514 as belonging to Brinkerhoff;[9] yet Mr. Searle himself, **for the first time,** identified that number during final argument as Brinkerhoff's and argued that Brinkerhoff had conversations with Defendant *via* that number;
3. The fact that there was no evidence on the record to support Mr. Searle's argument that the telephone calls made to (801) 953-6857 were to Defendant; or
4. The fact the telephone records were never admitted into evidence in the first place.

The circumstantial evidence of numerous phone calls, ostensibly between Don and his co-conspirators, is compelling–if not overwhelming–if one presumes that each telephone call to or from Don's telephone number was a call made by or to him, and that each phone call to or from the other alleged co-conspirators' numbers was made by or to each alleged co-conspirator. This presumption is not true, or at the very least Don had a plausible explanation for the telephone calls from and to him, but the jury never heard Don's explanation. He was not allowed to testify and Davey, who could have controverted and explained the phone records, was not called as a witness. Had Don been called as a witness, he would have refuted the phone and circumstantial evidence.

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[9]At R.502:386, Brinkerhoff testified, in response to Mr. Searle's question "Do you know the phone number of your sister? " to which Brinkerhoff stated "I do not." Then, in response to Mr. Searle's question "[d]o you remember the phone number of Mr. Desvari?" Mr. Brinkerhoff responded "It was a cell number. "604" is all I remember. I don't remember the actual number."

Ditto for defense counsel having Davey testify. R.1092-1088 (Davey was on the witness list R.192),1086,1084,&1076.

To restate the standard from ***Strickland*** at 694, to prevail on this issue,

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [emphasis added]

This court's obligation in considering the issue is described in ***Strickland*** at 695-696 as follows:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

It is relatively easy to conclude that there is a reasonable probability that the result of Don's trial would have been different in the absence of the errors committed by Don's counsel. As it was, no testimony whatsoever was presented to the jury that there were other, plausible, explanations for the telephone calls attributed by Mr. Searle to Don and Ben and Brinkerhoff in furtherance of the alleged conspiracy when in reality they were legitimate conversations between Don and Davey concerning their business relationship and Davey and Brinkerhoff. The jury had no option but to accept the State's version of the "facts," because nothing was

presented to them from which they could come to any other conclusion.

Absolutely no trial strategy would allow defense counsel to stipulate to the phone records, especially at the end of the state's case-in-chief and when the prosecutor never had the state's witnesses identify the phone records or even had them look at these records.[10]

C. Whether The Foregoing Argument Constitutes Prosecutorial misconduct

State v. Todd, 2007 UT App 349, ¶ 22, in on point concerning the prosecutor's wrongful conduct by referring the jurors to matters outside the evidence (at ¶ 22):

> Rule 3.4(e) of the Utah Rules of Professional Conduct provides that a lawyer may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." Utah R. Prof'l Conduct 3.4(e). A prosecutor's "suggest[ion] to the jury that they consider and `deliberate' matters outside the evidence" constitutes prosecutorial misconduct. State v. Troy, 688 P.2d 483, 486 (Utah 1984). See State v. Hopkins, 782 P.2d 475, 478 (Utah 1989) ("[C]ounsel is precluded from arguing matters not in evidence."); State v. Palmer, 860 P.2d 339, 344 (Utah Ct.App.) ("A comment by a prosecutor during closing argument that the jury consider matters outside the evidence is prosecutorial misconduct."), cert. denied, 868 P.2d 95 (Utah 1993).

The prosecutor asked the jurors to consider matters outside the evidence – "I'll just briefly remind you, we didn't even talk about all these phone calls." R.504:845; R.1031:162. The totality of the prosecutor's closing argument was based on matters outside the evidence. The exhibits were not entered into evidence. Assuming arguendo, they were, the prosecutor's statements were nothing more than him attempting to testify, to have the jurors consider matters outside the evidence. Certainly, his witnesses did not so testify.

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[10] Rhetorically speaking, why would defense counsel stipulate to the admission of the phone records at the end of the State's case-in-chief, when not one of their witnesses testified from these phone records, and when the State, in opening argument, told the jury that they had **custodians of records** that were going to come and testify; yet, no custodians of the records testified. This was defense counsel's argument during his close. R.504:834.

V. WHETHER APPELLANT'S DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO THE HEARSAY TESTIMONY OF TED ANTHONY AND FAILING TO FILE A MOTION IN LIMINE TO EXCLUDE THE STATEMENTS

On December 2, 2005, trial counsel sent a letter to Don, informing him of the fact that Idrese Richardson is a critical factor to their defense. R.1065-66.

During the trial, Ted continuously testified to hearsay statements made by Idrese to him without any objection whatsoever by trial counsel. *See* ¶¶ 20-32 of the Statement of Facts for the various parts of the record where this occurred.

Rule 801(c), U.R.E., defines hearsay as "a statement, other than one made by the declarant . . ., offered in evidence to prove the truth of the matter asserted". By these evidentiary rules, such hearsay is inadmissible. The very statements show that they were offered for the truth of the matter asserted because Ted was testifying about the fact that Don was involved in a conspiracy to kill his exwife. The statements he attributed to Idrese also dealt with hiring a hit man to kill his exwife.

There is no conceivable trial strategy that would countenance trial counsel allowing damaging hearsay evidence in without objection, underscored by their December 2, 2004 letter (R.1066-65) where defense counsel admitted that Idrese was critical: "If he doesn't back us up, our defense is weakened." In light of this, rhetorically speaking, why would defense counsel allow such damaging hearsay evidence. To do so is clearly deficient performance. It falls below an objective standard of reasonable professional judgment. Rhetorically speaking, what trial attorney would allow hearsay evidence in without objection on the most major issue of the state's case-in-chief, i.e., whether Don was guilty of a conspiracy. Ted's unchallenged

statements clearly went to that issue. Trial counsel's failure to object is made more egregious by two more factors: (1) trial counsel knew that Idrese was not going to testify because they failed to investigate his testimony and failed to meet with him; and (2) trial counsel perpetuated this hearsay by asking Ted further questions that called for more hearsay. R.503:464.

The prejudice is that the jury heard these hearsay statements without objection implying that they were true. Had an objection been timely made prior to Ted's answer, the jury would never had heard these very questionable statements. It hardly goes without saying that these statements prejudiced Don and led to his conviction.

Equally egregious is that during Ted's testimony at the preliminary hearing, he testified the same way he did at trial. *See* Statement of Facts ¶¶ 20-32, R.490:21. From February, 2005 to the trial in December, 2005, trial counsel could have filed a motion in limine excluding these hearsay statements or precluding Ted Anthony from testifying to anything Idrese may have said but did not. R.1031:77.

There was no legitimate strategy in failing to timely file a motion in limine. Had the motion was denied, immediate steps could have been taken to obtain Idrese and investigate his being a witness or to blunt the harsh effects of these statements. However, without the motion being filed, trial counsel never effectively dealt with this hearsay issue, resulting in obvious prejudice to Don. *See* ***State v. Ferry***, 2007 UT App 128, ¶¶ 15, 16.

VI. WHETHER DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO PREPARE AND INVESTIGATE FACTS AND WITNESSES IDENTIFIED BY DON AND TO CALL AND/OR SUBPOENA DEFENSE WITNESSES

A. Failure To Prepare And Investigate Witnesses

The affidavits of Don (R.1065-1098), Glenda (R.1099-1110), Melody (R.1054-1057), and Diane (R.1058-1064) all demonstrate trial counsel failed to investigate these persons (and other witnesses identified by Don in his affidavit) to determine to what they would testify, whether such was material, and whether such testimony would be useful in defending Don. With the exception of Melody Oliver, the other witnesses could have testified to conversations they had with Ben Desvari that exonerated Don, i.e., meeting in the Murray park and at Diane's home. R.1064-1062.

Defense counsel admitted at the remand trial (R.1031:40) that Davey would have been a relevant witness had he known that the phone exclusively used by Ben Desvari actually belonged to Davey Desvari; yet, defense counsel never took any steps to compel Davey Desvari's attendance at trial. Defense counsel also admitted they never investigated Davey and his witness potential. R.1031:46. These admissions clearly demonstrate that defense counsel were not prepared for trial by reviewing preliminary hearing transcripts. Factually, the phone Ben used belonged to Davey. At the preliminary hearing on December 21, 2004, Ben testified that the phone he exclusively used belonged to Davey; and the phone records Mr. Bugden had for 10 months included Davey phone records – with his name on the records. R.489:15,29,39,69. Yet, defense counsel never investigated this and other facts and never took any measures to ensure that Davey would be there for trial. (R.489:15)

Those persons listed in Don's affidavit: Davey and Idrese, should also have been called. As stated before, Davey's testimony was critical concerning the phone call which he made to Magna which the state characterized as the "corroborating evidence" of the conspiracy and other

material facts. R.1091-1088,1083. Ditto for Idrese who defense counsel agreed at the remand hearing **would be a helpful witness**. R.1031:80; R.1066. Yet, defense counsel never interviewed him and never called him as a witness. R.1073. Idrese would have testified that Ted's testimony concerning what he said was totally false. The prejudice is obvious. Had Davey testified, the myth of the so-called corroborating evidence would have been dispelled, creating reasonable doubt. Had Idrese been called, the testimony of Ted would have been discredited, again creating reasonable doubt. And, Melody's testimony was critical to impeach that of Ted. R.1055-56:¶¶ 4-9.

In ***State v. Hernandez***, *supra*, the Court of Appeals, at ¶ 19, cited the following:

> The Utah Supreme Court has held that
>
> [i]f counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the 'wide range of reasonable professional assistance.' This is because **a decision not to investigate cannot be considered a tactical decision.** It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons. [Emphasis added.]

None of the testimonies of Ben, Brinkerhoff, and Anthony was challenged. Trial counsel's failure to investigate potential defense witnesses prejudiced Don. Having these witnesses testify, "may have made a significant difference in the outcome of the trial". They were crucial to raising reasonable doubt that would have given Don a much stronger defense than the one presented to the jury. *See* ***State v. Bleazard***, 2004 UT App 351 ["Trial counsel's failure to provide the cautionary instruction, coupled with the absence of the [witnesses'] testimony, resulted in prejudice sufficient to undermine our confidence in the jury's verdict.

Thus, Defendant did not receive effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-94 (1984)."]

B. Failure To Investigate Facts

See **Argument I** for the lack of investigation by defense counsel of the phone records. Had defense counsel investigated these phone records, they could have effectively cross-examined Ben and Brinkerhoff re their testimonies concerning the sequence of the phone calls, creating reasonable doubt thereby.[11] However, their failure let the co-conspirators' testimonies

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[11]Detective Chamberlain testified that he arrived at Susan's home at 8:30 p.m. on September 11. R.502:272. The phone calls in question had to occur subsequent to 8:00 p.m. Brinkerhoff testified that he called Ben Desvari from his sister's house in Magna after he left Grantsville. Brinkerhoff then testified that after he got to his sister's house in Magna, he called Ben from his sister's house to tell him he did not do it. R.502:385. Ben asked Brinkerhoff to give him his phone number and Ben would call him back. Brinkerhoff then said Ben called him back and then Don called. R.502:385. The Desvari phone records indicate otherwise. Assuming that the sister's Magna phone number was 801-508-7514, the Desvari phone records indicate that a call was made to 801-604-0408 (the Desvari phone number) from 801-508-7514 at 8:54-55 p.m., with a duration of 19 seconds (obviously, no conversation took place). Then at 8:58 p.m. a phone call was made from 801-508-7514 to 801-604-0408, with a duration of 4 minutes 52 seconds. Not one call was made from the Desvari cell phone to 801-508-7514 until 10:58 p.m. and that call lasted 11 seconds (obviously, no conversation took place). Even more interesting is that Don's cell phone records indicate that a call was made from his cell phone to 801-508-7514 at 9:08 p.m. on September 11, 2004. That call lasted about 6 minutes. However, these combined records indicate that Brinkerhoff was not telling the truth. Had he spoken to Ben the second time a call was made to 801-604-0408 from this assumed Magna phone belonging to his sister (the first call from 801-508-7514 lasted only 19 seconds so obviously no conversation), then the phone records should indicate that 801-604-0408 would have called him almost right back (the phone records do not indicate this) and this call back would have occurred before Brinkerhoff received Don's call to 801-508-7514, which it did not. As stated above, there was no call back to 801-508-7514 until almost two hours after that number was called from Don's phone.

Equally interesting is the fact that the Desvari phone records indicate that a call was made from 801-604-0408 to Don's number some 36 minutes after the 801-508-7514 phone call was made to the Desvari cell phone, indicating these witnesses were not telling the truth. *See* State's trial exhibits 19, 20, 21.

stand. No reasonable doubt was created by this failure.

By their failure to investigate the facts, defense counsel also failed to effectively cross-examine Brinkerhoff. Brinkerhoff testified Don came to Magna to meet him on the evening of September 11, 2004. R.502:386. When cross-examined, Brinkerhoff was never asked what time they met, where they met, or who was present. R.502:393-423,425-426. This evidence would have been critical since it would have established an alibi for Don.[12] With an alibi established, Brinkerhoff would have been discredited. By his ineffectiveness, defense counsel failed to grasp this opportunity to establish reasonable doubt.

Moreover, **if Don made this call, why did he have to meet Brinkerhoff in Magna**? The alleged report could have been given to him during this phone call. Yet, Don's trial counsel never cross-examined him on this point. Furthermore, Brinkerhoff testified that Don only remained in Magna with him for a few minutes and left because he got so many interrupting cell phone calls. R.502:386. Brinkerhoff's testimony regarding this version of events makes no sense; however, Don's trial counsel never properly cross examined Brinkerhoff concerning this improbable testimony.

VII. WHETHER THE REMAND FINDINGS WERE SUPPORTED BY THE RECORD

Finding 5: Wally's testimony was not **fully** corroborated by Tara's testimony and vice versa. For marshaling purposes, the trial court, after considering the trial transcript, made this finding

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[12]Don just returned to Salt Lake City from a vacation to Disneyland at about 8:00 p.m. R.1105. Don left his parents' home at about 8:40 p.m. Glenda called him at around 9:00 and at 9:10 p.m. at his apartment in Salt Lake (when she heard Davey Desvari in the background speaking on a cell phone). R.1104. Don called Glenda at 10:35 and told her Susan called demanding the children be brought home. Don got to Glenda's home at about 11:00 p.m. and they drove to Grantsville. At 11:45, Don was taken to the Grantsville police station. R.1103. *See* Affidavit of Diane, R.1060-1059 and Don's Affidavit R.1077,1081,1087-86,1090,1091.

as indicated by its citations to the record in subsequent findings which pinpoints the evidence relied upon to support the findings. R.1031:7-162. This marshaling process also pertains to the objections to Findings 6, 9, and 10. Ms. Isaacson attempted to introduce documents into evidence that had never been seen by Mr. Drake and were not contained in the files delivered to him by Ms. Isaacson. The following occurred:

> Under examination, she first denied that Mr. Drake had ever requested her **whole** file. Then, when Mr. Guyon read her a letter from Mr. Drake's computer requesting the whole file several times in that letter, she denied receiving the letter. The order granting defendant's motion to supplement the remand record contained two exhibits, one, the actual letter and two, copies of bank records showing that Ms. Isaacson endorsed and negotiated a check in the amount of $506.25 which was contained in the letter she denied receiving. R.1031:1026-25. Obviously, her credibility is in question. She first denied Mr. Drake requested the whole file. Then when confronted with the fact that Mr. Drake sent her a letter requesting the whole file several times, she denied (then said "I don't' recall") receiving the letter. However, Ms. Isaacson cannot deny that she received the letter when her firm endorsed and negotiated the $506.25 check contained in that letter.

Id. at R.1031:203-204.

These facts clearly demonstrate that Ms. Isaacson was not a completely credible witness. Moreover, it is inconceivable that Mr. Bugden did not know about R.1026-25 and the documents Ms. Isaacson brought to the remand hearing, never provided Mr. Drake.

There was other lack of corroboration. Tara testified that on the big evening in question after Brinkeroff's testimony about the phone call to Magna Don and defense counsel met at their office. Tara testified, "But a decision or discussion about whether he would or would not testify did not occur on that evening. R.1031:179. Cf this with Wally's testimony at R.1031:22-23: "However you want to work it out. I am just telling you it was Tuesday night that we had a come-to-Jesus talk with Don about his testifying." (Don testified Wally was not present, which could explain this lack of corroboration. R.1031:213.) Mr. Drake offered to be placed under

oath when State's exhibits 5 & 6 were offered to show defense counsel never provided him with these documents even though the whole file was requested. Consequently, the State withdrew these exhibits. R.1031:209-10.

Finding 6: concerning Wally's credibility. *See* Don's response to Finding 5. Wally attempted to overstate what was placed in a December 2, 2004 letter to Don about his decision to testify. R.1031:24 & Don's Exhibit 29.

Finding 9: re Tara's corroboration of Wally's statements. *See* Don's response to Finding 5.

Finding 10: concerning Tara being a completely credible witness. *See* Don's response to Finding 5. The trial court's granting Don's motion to supplement the remand record with the Mr. Drake's letter and exhibits (R.1031:1026-25) is a seeming contradiction of this Finding. Moreover, Tara testified she did not know about the critical phone number until trial. R.1031:192. Yet, Wally referred to not only the phone number but who it belonged to in his closing argument the next day, implying that it was listed in the phone book as belong to Carol Durrant, Brinkeroff's sister. *See* response to Finding 13.

Findings 13 is not supported by the record. Support for this finding is found at R.1031:22. The phone records demonstrate a call was made from Don's cell phone to a Magna number (unidentified at trial). Trial Exhibits 19-21. Don testified that Davey Desvari used his cell phone on 9/11 to make that call. R.1031:215-219. There was no surprise. Tara testified she had gone over all of the phone calls since day one. R.1031:170. She broke down the phone numbers and made notes. R.1031:174. But, defense counsel was disingenuous. During closing argument on the 4th day of trial (the evening before is when defense counsel claimed surprise) Wally

disclosed to the jury in closing argument that:

> And a huge part of Mr. Searle's argument is to argue to you that phone calls that were made to 508-7514, that that proves everything, that that cinches up all of the arguments. . . . R.504:832.
>
> Has the State proven to you whose phone number 508-7514 was? Brinkerhoff didn't even -- Mr. Brinkerhoff did not even say that he knew the number. . . . They didn't even show him the phone number and say, Is that your sister's phone? His sister has a name. I think the name is Carol Durrant. If it hasn't been testified to, of course she has a name. Okay? You know that. . . . **Well, some numbers are in the book.** R.504:833.
>
> The State didn't put evidence in front of you about who belonged to, by the way, (comma)7514. Brinkerhoff, the implication is that that's Brinkerhoff's phone number. But they didn't put on some evidence to prove who that number belonged to. R.504:834.
>
> I don't have the burden of proof. Remember that the State -- that's why he gets to talk again -- the State has the burden of proof. The State didn't call Carol Durrant. They didn't have the sister come and testify and tell you, That's my phone number.[13] The State is asking you to tie up that missing piece by the testimony of Ben Desvari and Mr. Brinkerhoff. And Brinkerhoff didn't really even vouch for a number, just that there were phone calls. R.504:835.

This demonstrates that there was no surprise. There is more evidence of disingenuousness by Tara's testimony that she didn't know about this phone call until trial thanks to Don. R.1031:192. Obviously, that is not true in light of Wally's closing argument. She had the phone records for almost a year; yet, she is blaming Don for her being taken by surprise. The question is begged – why didn't she investigate this number and prepare Don.

Finding 14 is not supported by the record. Support for this finding is R.1031:22. *See* the

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[13]Why would any defense counsel fill in that blank of a phone number that was the most critical piece of evidence and tie that number to Brinkerhoff by stating this number belonged to his sister? Why would any such attorney bring up such a damning fact that was not placed in evidence before a jury in closing argument? **THIS CLEARLY DEMONSTRATES INEFFECTIVE ASSISTANCE OF COUNSEL.**

response to Finding 13.

Finding 15 is not supported by the record. Support for this finding is R.1031:23. *See* the response to Finding 13. Moreover, in light of the suspect and self-serving testimonies of defense counsel, any statement they made about this evening could be discounted.

Finding 16 is unsupported by the record. Support for this finding is R.1031:23. *See* response to Finding 13. The handover of his phone to Davey is supported by defense counsel's own testimony that Don told them many times that after returning to Salt Lake City on 9/11, he was overjoyed and elated that Davey had just gotten out of jail and that Don met him that night (9/11/04). R.1031:108.

Finding 17 is unsupported by the record. Support for this finding is R.1031:23. *See* responses to Findings 13 & 16. In light of Don's statements that he met with Davey that evening, their statements of disbelief are not supported by the evidence.

Finding 20 is unsupported by the evidence. Support for this finding is R.1031:126,134. Defense counsel never used the terms "right" or "rights" in this context. R.1031:125-26. A canvass of the remand record reveals that never once did defense counsel use the words "right" or "rights". Re Finding 19, how, could they advise him of a right to testify without explaining the actual right? How could defendant be expected to know the origin of this right if no explanation were provided? Don never knew he had such a right. R.1031:219.

Finding 23 is unsupported by the evidence and the inconsistencies of defense counsel. Support for this finding is R.1031:215. *See* response to Findings 5 and 16.

Finding 29 is unsupported by the evidence. Support for this finding is found in the previous

findings 22 through 28. During the police interview, Don got a call from Ben. His conversation with Ben was not part of the police interview – in fact, the police left the room. R.1031:226. Because he was waiting for the police to return, Don said anything to get Don off the phone. This statement was not under oath. Wally testified this was a huge, big deal and problem for us. R.1031:104. This could have been easily corrected by calling Glenda as a witness to see whether he had been to his place and get the sequence of events of the times he came to Salt Lake City (Wally said he interviewed her to get the sequence of events R.1031:56. To make the statement that the phone calls and where Don was during the evening of 9/11 was a huge deal evinces that it was not a big deal until defense counsel got served with the affidavits of the four witnesses since such were not issues until raised by these affidavits. Moreover had Wally properly cross-examined Brinkerhoff about when and where Don met him in Magna, this would not have been an issue. Furthermore, why was that a huge deal when Don was with his parents and the issue of the phone calls to his home in Salt Lake City had not arisen until the affidavits? Since Don was traveling with his parents from LA to Salt Lake City and then to Magna, he could not have met Brinkerhoff on 9/11.

Finding 30 is unsupported by the evidence. A canvass of the whole record finds no support for this finding. There was no evidence of a factual change. *See* response to Finding 16 for corroboration of handing off the cell phone to Desvari. Moreover, never once did defense counsel investigate Desvari, a failure to investigate resulting in ineffective assistance of counsel.

> As stated in Don's Rule 52 motion (edited for this brief) (R.1032-1053):
>
> Moreover, had defense counsel properly cross-examined Brinkerhoff about the timing of the phone calls, this issue never would have arisen. How could **not**

> **asking** Mr. Brinkerhoff the date -- or the time, the place and who was present, when he allegedly met with Don on the evening of the supposed attack on Susan Hyatt be a strategic decision in light of the fact that defendant had just arrived back from California and met the police in Grantsville at about 11:30 p.m., in light of the fact that the alleged attack occurred after 8:00 p.m.? The possibility of an alibi was never exploited by cross-examination. R.1031:30-31. This cross-examination is critical in light of the fact that Finding 38 speaks in terms of an "unexpected trial development" or as Mr. Bugden put, the testimony of Brinkerhoff caused him to have a come-to-Jesus meeting with defendant. That is how critical defense counsel viewed this phone call testimony. In light of this, the fact that Mr. Bugden failed to ask critical and simple questions of Brinkerhoff concerning the time he called defendant after 8:00 p.m. and the time defendant allegedly met him in Magna would have avoided this issue. These facts and omissions clearly contradict **¶ 5, RULE 23B FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

Finding 32 regarding the difficulty of making a note of handing a phone to a friend is not supported by the record. There are no marshaling facts. It is an unsupported supposition ignoring Don's affidavit regarding his note taking – *see* fn 1, R.1086.

Finding 33 is also unsupported by the evidence. The Court stated that defendant's affidavit is riddled with numerous inconsistencies and contradictions; yet, there is no cite to the record or specifics. In marshaling, Don told Ben during the phone call at the police station he had not been home or yet unpacked and Don's affidavit challenged the $20,000 arrears. Nowhere else is there any indication of inconsistencies and contradictions. This finding is not true. Concerning the $20,000 owed to ORS, defendant thought he owed much less – he would make lump sum payments from homes he sold. R.1031:78 (acknowledged by Wally.) There is no proof that Don was so advised by his divorce counsel. On the other hand, the trial court failed to acknowledge the inconsistencies and contradictions of counsel when compared with the whole trial record. *See also* e.g., the inconsistencies and contradiction of defense counsel.

Finding 34 may be supported by the findings but is not equitable. Mr. Drake never received a copy when asked for the whole file. R.1031:210. Also, there is no evidence Don received one.

Finding 35 is unsupported by the evidence. Marshaling would include the cites to the findings preceding Finding 35. However, *see* the response to Finding 16 about meeting Don that evening and response to Finding 32.

Finding 36 is unsupported by the evidence. Marshaling would include the cites to the findings preceding Finding 35. Nowhere is the trial court specific. What about Don's demeanor, temperament, and actions while testifying led him to this conclusion? What about the demeanor of defense counsel who testified in a manner inconsistent with each other and the trial record?

Finding 37 is unsupported by the evidence. Marshaling would include the cites to the findings preceding Finding 35. After canvassing the remand record, never once did defense counsel tell Don that he had a "right" to testify. As R.1066-65 states, the decision is yours. It was repeated.

Finding 38 is unsupported by the evidence. Marshaling would include the cites to the findings preceding Finding 35. There was no unexpected development at trial. (If there were, this would be the result of failure to investigate the phone records, Davey Desvari, and Don, which would be ineffective assistance of counsel.) *See* response to Finding 13.

Finding 41 is unsupported by the evidence. Ms. Martin was interviewed by Doug Maack. Defense counsel did not know the results of that interview. R.1031:52-54. Counsel admitted that it would have been a central issue to this case if he got the files of David Brown and Greg Marcum which indicated Diane had this conversation with Ben in her home. R.1031:62. Having said this, if he failed to fully investigate the files of David Brown and Greg Marcum and Diane, such could constitute ineffective assistance of counsel. At R.1031:100, Wally said Diane had never told that to our investigator, never told that to us. By this answer, Wally just contradicted himself when he first testified he did not know the results of the interview with his investigator. Diane said she told the investigator about this meeting in the Murray park, with Ben in her home, and calling Don at his home during the evening of September 11. R.1062-61. Defense

counsel said they never heard about this until they got her affidavit. R.1031:101,102. Wally again contradicted himself (not knowing what Diane told his investigator) when he said that Diane was not a necessary witness because she did not participate in the meeting in the park, did not know anything about the Desvaries, and never told them anything about calling Don on September 11. R.1031:102. Wally stated that Diane never told defense counsel about this phone call on 9/11 R.1031:105, Don never told him about this phone call R.1031:108,120,141 (another contradiction regarding his investigator),171 (Tara testifying),178 (never heard of Diane calling Don on 9/11),184 (her calling Don on 9/11 would have been important to her that she did not tell Tara about this),185 (not aware of phone call), and 195 (not aware of phone call). Don told Wally and Tara about Diane's phone call to his home on 9/11 R.1031:221, 222 (got a letter from Tara that Diane was not going to be used & he again told her about the 9/11 phone call).

Finding 44 is unsupported by the record. The support for this finding comes from R.1031:178. However, Wally talked to Glenda about the sequence of events on Don's return from LA. He also prepared Glenda as a witness. R.1031:56. It is a wonderment that defense counsel would believe the statements of Glenda re the Murray park meeting were unbelievable and self-serving (R.1031:115) but that Diane's testimony regarding meeting Ben in her home and hearing him say the same thing as he said in the Murray park would have been important. R.1031:62. Defense counsel just didn't own up to the fact that they were unprepared and did not investigate the facts and issues as they should. An example of this is the phone records that they had for 10 months. It is a wonderment that in this length of time, they were still taken by surprise by a call from Don's phone to a number in Magna that was in plain sight in the phone records.

Finding 47 is nothing more than a result of the slipshod defense preparation by defense counsel. The marshaling cites are R.1031:115,178. Defense counsel never provided any effective cross-examination of any of the State's witnesses to create reasonable doubt. They never provided any

fact witnesses to contradict or rebut the testimonies of the co-conspirators. In fact, defense counsel never cross-examined Ben about this meeting in the park. Had they done so and he admitted it, that would have created reasonable doubt. Had he denied it, Glenda could have testified in rebuttal. Glenda would have made a much better witness than the meth-using Ben and would have been much more believable.

Finding 48, in light of the response to Finding 47, this finding is unsupported by the evidence.

Finding 55 is unsupported by the evidence. Support for this finding is found at R.1031: 24-25. The very fact that Melody signed an affidavit setting forth facts that Ted Anthony would have said or done anything to destroy Don clearly demonstrates that this finding is a fallacy, nothing more than the self-serving statements of defense counsel. R.1057-1054.

Finding 60 is unsupported by the evidence. Support for this finding is found at R.1031:39,40,121, 122,&139. *See* response to Finding 16 and section **VI** of the Argument: A. Failure To Prepare And Investigate Witnesses. This is yet another example of defense counsel's failure to investigate.

Finding 63 is unsupported by the evidence, *see* response to Finding 60. Support for this finding is found at R.1031:39,40,121, 122,&139. The affidavit of Don is filled with information he provided defense counsel concerning the necessity of calling Davey. R.1091-1088,1083.

Finding 2, Claims of Ineffective Assistance of Counsel, is unsupported by the record. The support for this finding is found in all of the references to such in the above responses and R.1031:159-160,161,170,192,194. Wally made an important admission concerning his performance: "Well, as I sit here today, the three witnesses who all said that Don hired them, that was pretty compelling evidence, and I don't know that we would have created reasonable doubt impeaching them even if there were no phone records, but the phone records corroborated them. R.1031:90. Compare this with Wally's testimony: "How are you going to have

overwhelming evidence that Don is innocent, other than to attack his accusers, and his main accusers are the three people we have talked about all day long, and we did everything we could with Don's assistance to find ways to impeach the credibility of each of these witnesses, and we thought we did a good job doing that with what we had to work with." R.1031:121. In light of these self-serving statements, the facts indicate otherwise. Defense counsel never called anyone who could have impeached these witnesses (other than Krautz). Glenda would have been perfect to call. Ditto for Diane. Ditto for Melody. Had they thoroughly investigated this case, there was absolutely no reason for them to have advised/told Don not to testify. Defense counsel had the phone records for 10 months with the critical Magna phone number plainly visible on both phone bills. There was absolutely no reason for to have been taken by surprise (especially since Wally referred to this Magna phone number in his closing argument and identified that it belonged to Brinkerhoff's sister). Moreover, had defense counsel investigated Davey and he corroborated Don's statements about his using Don's phone on 9/11, this problem with the phone number would have been dispelled. Had defense counsel called Glenda to testify, she could have provided a time line of where Don was the evening of 9/11, that he could not have met Brinkerhoff in Magna (and had Wally effectively cross-examined him on this point, there would have been no question). Had defense counsel filed a motion in limine preventing Ted from making hearsay statements, the jury would not have been improperly influenced by his lies. The problems with this case boils down to defense counsel's failure to investigate the many witnesses presented to them by Don and his parents, failure to investigate the phone records, failure to communicate amongst themselves and their investigator, all to the expense of Don. The problem is also lack of preparedness. Defense counsel's statements that they had the phone records for 10 months and that Tara worked on them for days and prepared Don with them makes absolutely no sense in light of their admissions they were taken by surprise by

Brinkeroff's testimony. In light of all of this and the foregoing portions of this brief, it is obvious this finding has no support. Troubling is that defense counsel, during the remand trial, have been disingenuous and not forthcoming as set forth in the above-responses. How then, can they believed? Tara admitted she had no affirmative defense to counter the material evidence that these lowlifes and people had presented to the jury. R.1031:199. This admission belies a thorough investigation by an experienced defense team. Moreover, Tara also admitted that "For 13 months prior to trial, all defense counsel could do was to defend the case by cross-examination and not by providing material evidence or witnesses on Don's part". R.1031:197-98. Again, this belies a thorough investigation by an experienced defense team. What about having Glenda , Duane Millard, Diane Martin, Don, and Melody Oliver testify? Don could have poked holes in the State's witnesses' testimonies. Moreover, if the only strategy defense counsel could come up with was cross-examination, wide did they fail to effectively cross-examine Brinkerhoff, Ben, and Ted? Why, when knowing that the phone call from Don's phone to Magna on 9/11 was so critical, did defense counsel, after the State had rested and had never shown any phone records to its two co-conspirator witnesses, stipulate to the admission of these phone records? Consequently, this finding is unsupported by the remand record.

Finding 3 is unsupported by the record and incorporates hereat the same challenge made to Finding 2. The support for this finding is found in all of the references to such in the above responses and appears to be a synopsis of the previous findings. The challenge to Finding 2, clearly demonstrates that the defense team performed deficiently in the challenged areas.

Finding 4 is unsupported by the record and incorporates hereat the same challenge that was made to Finding 2. The support for this finding is found in all of the references to such in the above responses and appears to be a synopsis of the previous findings. The challenge to Finding 2, incorporated hereat, clearly demonstrates that with effective assistance of counsel, a different

outcome is highly probable. Proof of this is that defense counsel never provided an explanation to the jury that countered the State's witnesses. The jury had nothing to go on except for the statements of the lowlife witnesses. Defense counsel couldn't even effective cross-examine these witnesses. All they did was attempt to impeach them as convicted drug users. They never challenged these witnesses statements with either effective cross-examination or calling witnesses to challenge them. Had defense counsel been prepared with the phone records, Don could have rebutted the testimonies of these witnesses.

Finding 5 is unsupported by the record and incorporates hereat the same challenge made to Findings 2 and 4. The support for this finding is found in the previous references to such in the above responses and appears to be a synopsis of the previous findings. The foregoing challenges to the findings under this section clearly demonstrate that the defense team's trial preparation and performance fell below an objective standard of reasonable professional judgment and certainly did not significantly exceed that standard.

Finding 6 is unsupported by the record. The support for this finding is found in the previous references to such in the above responses and appears to be a synopsis of the previous findings. The prejudice to Don is obvious as has been set forth in the challenge to Findings 2 and 4. Had the deficiencies in defense counsel's performance not been present, reasonable doubt could have been established, resulting in an acquittal. The phone call to Magna from Don's phone on 9/11 was the most critical piece of evidence since it seemingly tied the co-conspirators to Don. Had defense counsel been prepared, Brinkeroff's testimony could have been easily contradicted.

Finding 7 is unsupported by the record. The support for this finding is found in the previous references to such in the above responses and appears to be a synopsis of the previous findings. *See* responses to Findings 20, 22, and 37.

VIII. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE BY FAILING TO PRESERVE THE RECORD

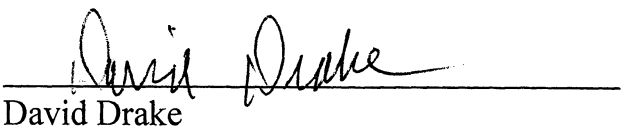
During the course of the trial, there were many side-bar conferences, without a court reporter present making an accurate record. *See* ***State v. Smedley***, 2003 UT App 79.

CONCLUSION

Defense counsel's multitudinous errors set forth herein all constituted objectively deficient performance, not rising to the standard of reasonable professional judgment, and cannot be attributed to any legitimate trial strategy. Defense counsel's errors were prejudicial to Don, for in the absence of the errors, there is a reasonable probability of a different result. There is no question that the prosecutor engaged in misconduct by testifying to matters outside of the evidence and drawing the jurors' attention to these matters. Don's 6th Amendment right to effective counsel was denied him by the ineffective assistance of counsel he received from defense counsel. Moreover, not being advised of his constitutional right to testify, he had no idea he could exercise this right. Consequently, the conviction of the trial court should be reversed and this case remanded for a new trial.

RESPECTFULLY SUBMITTED this 3rd day of August, 2009.

DAVID DRAKE, P.C.
Attorney for Appellant, Donald Millard



David Drake

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 3, 2009 a true and correct copy of the foregoing Initial Brief was mailed, first class postage prepaid, or by expedited mail, or by hand-delivery to opposing counsel on August 4, 2009 to the following counsel of record:

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